

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JOSEPH FORINO,

Petitioner,

MEMORANDUM & ORDER  
10-CV-5980 (JS)

-against-

WILLIAM A. LEE,

Respondent.

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APPEARANCES:

For Petitioner: Joseph Forino, pro se  
Prisoner No. 07-A-4347  
Green Haven Correctional Facility  
P.O. Box 4000  
Stormville, NY 12582

For Respondent: Douglas R. Noll, Esq.  
Nassau County District Attorney's Office  
262 Old Country Road  
Mineola, NY 11501

SEYBERT, District Judge:

Pending before the Court is Petitioner's motions: (i) to stay his 28 U.S.C. § 2254 petition so that he can fully exhaust his state court remedies (Docket No. 7); and (ii) extend his time to file a traverse (Docket No. 13).

Petitioner's motion for a stay asks the Court to hold his § 2254 petition in abeyance while he returns to state court to file a writ of error coram nobis, challenging ineffective assistance of appellate counsel. To warrant a stay, Petitioner must show: (i) good cause for his failure to exhaust, (ii) that his unexhausted claims are potentially meritorious; and (iii)

that there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). Upon reviewing Petitioner's motion papers (Docket No. 7), the Court is satisfied that he has met this burden. He shows good cause by explaining his dueling needs to file a timely § 2254 petition while, at the same time, properly support his forthcoming state court ineffective assistance of appellate counsel claim by obtaining a statement from counsel. His ineffective assistance of appellate argument is not frivolous on its face, and thus may have some merit. And Petitioner has not engaged in any dilatory litigation tactics. Moreover, Respondent has not opposed this motion. Consequently, Petitioner's motion for a stay is GRANTED.

Petitioner's motion for an extension of time asks for 60 days from the Court's decision on his stay motion to file a traverse. Because Petitioner's case is now stayed, this motion is DENIED AT MOOT. Upon the resolution of his state court error coram nobis proceeding, Petitioner can return to this Court with an Amended Petition. Until then, he has no obligation to file anything.

Respondent is directed to serve a copy of this Order  
upon the pro se Petitioner.

SO ORDERED

/s/ JOANNA SEYBERT  
Joanna Seybert, U.S.D.J.

Dated: May 9, 2011  
Central Islip, New York